In The Supreme Court of the United States

OCTOBER TERM, 1946

No. 770

THE CITY OF PORTLAND, A MUNICIPAL CORPORATION,
Petitioner, Appellant and Cross-Respondent below,
v.
PUBLIC MARKET COMPANY OF PORTLAND,
Respondent and Cross-Appellant below,
and
RECONSTRUCTION FINANCE CORPORATION AND THE FIRST NATIONAL BANK OF PORTLAND (OREGON),
Respondents and Cross-Appellants below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON AND BRIEF IN SUPPORT THEREOF

JAY BOWERMAN,
LYMAN E. LATOURETTE,
MARIAN C. RUSHING,
Attorneys for Petitioner
(Defendant-Appellant below).
HART, SPENCER, McCULLOCH & ROCKWOOD,
COOKINGHAM & HANLEY,
Attorneys for Plaintiff-Respondent below.
GEORGE R. WILBUR,
EDGAR FREED,
Attorneys for Defendants-Respondents below.

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The omission in this petition and brief of record page numbers is unavoidable because none of the record other than abstracts of pleadings and the decrees were printed when the case came before the Supreme Court of Oregon and the record is so extensive that it could not be prepared and printed within the time available. Permission is requested to have the page numbers, which petitioner's counsel will supply after the Record is made up and printed, inserted subsequently.

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To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a suit in equity brought in the Circuit Court for Multnomah County, Oregon, by respondent, Public Market Company of Portland, herein, against the City of Portland,

petitioner, Reconstruction Finance Corporation, and The First National Bank of Portland (Oregon), for an accounting and specific performance of a contract for the purchase by the City of certain property, and an accounting with Reconstruction Finance Corporation and said Bank concerning the amount due on a mortgage against the property, and a decree for a release, if paid. The case was tried by the court without a jury and resulted in a judgment entered August 1, 1944, against the City allowing the Company damages in the sum of $791,666.67,—to inure to the benefit of the Bank, trustee for RFC. (R .... and ....).

An appeal was taken by the City to the Supreme Court of Oregon which increased the amount of damages by the sum of $163,943.96, making $663,943.96, plus interest at 6 per cent per annum, thus making a total as of September 17, 1946 (date of entering the mandate in the lower court) $1,135,676.07. (R .... and .....).

For brevity we will here refer to the petitioner as the City, the Public Market Company of Portland as the Company, Reconstruction Finance Corporation as RFC and The First National Bank of Portland (Oregon) as the Bank. All of the parties are corporations.

The principal questions involved on the appeal were: (1) whether the law of the case was established by a previous decision of the Supreme Court as a result of which the case would be treated as converted from a suit in equity

for a specific performance of the contract to an action for damages, as in tort, fixing the liability of the City and the measure of damages, without any allegations having been made concerning the supposed acts of negligence or the amount of damages proximately resulting therefrom, without having given the City leave to deny such allegations and show, if it could, that the failure of the Company to receive payment was because of its own acts which prevented the City from issuing revenue bonds (called utility certificates under the City's charter) by which payment was intended to have been made, and prevented the City from selling the certificates, if they could have been issued, it being claimed on behalf of the City that a conversion of the case, under these circumstances, to one in tort in place of one on contract was a violation of the 14th Amendment to the Federal Constitution because the City was denied its day in court and due process of law with respect to such new cause of action; (2) whether the previous opinion of the Supreme Court could be fairly interpreted as intending such result; (3) whether the Supreme Court, being only a court of review in matters like this, had jurisdiction or authority, after finding that specific performance could not be decreed, to go beyond the matter litigated in the court below, treat the case as one to recover damages for supposed negligence, find the City guilty of negligence, and declare the measure of damages therefor, all being void, as claimed by the City, because in violation of said constitutional provision and in

violation of the Oregon law fixing the courts' jurisdiction; (4) whether or not the true measure of damages (if negligence on the part of the City rather than negligence on the part of the Company be assumed as the proximate cause of damages and if a court of equity rather than a court of law be assumed as being the proper forum for trial) should not have been based upon the amount for which the certificates could have been sold rather than upon the contract price, thus confining the recovery of damages to the amount by which the result of sale (up to the contract price) would exceed the value of the property retained by the Company; (5) whether, as the result of the accounting, the contract price should be fairly claimed to be more than $1,268,793.11 in place of $1,463,943.96 as found by the Court, (and this involved minor questions concerning several items in the accounting), and (6) whether or not the value of the property as of the time when title papers were rejected as above stated was not fully as much as the contract price. (See opinion in Public Market Co. of Portland v. City of Portland, et al, 42 Or. Adv. Sheets, 873-903; 170 P. (2d) 586).

The previous decision above referred to is in 171 Or. 522; 130 P. (2d) 624; 138 P. (2d) 916, and another decision yet before that may be found in 160 Or. 155; 82 P. (2d) 440.

In order to make a fair presentation of the matter as it

now comes to this Court for relief under the 14th Amendment we will here give a brief historical statement.

The contract is dated October 28, 1931. The City at that time, and previously, owned market booths which had been constructed in street area (SW Yamhill Street between Second and Fifth Avenues) and which were used for conducting a public market whereby the public could purchase food directly from the producers. This market was known as the Carroll Public Market. While the City was seeking to have this market removed from the street because of traffic congestion, the Company acquired property adjoining the foot of the street (between Front Avenue and the River), investigated its suitability for a public market operation under private ownership, obtained from the City Council a vacation of certain street area, cleared old buildings from the area, prepared building plans and took preliminary steps for construction. (R ..... and .....). It then halted further work because of discussion favoring an off-street market in the vicinity under City ownership. (R .....). As a result the contract above mentioned was signed whereby the Company agreed to provide the land, erect a building, obtain and install equipment, material, supplies and lessees, and establish a market for the City at a price of $1,244,790.60 for land and building, plus the cost of equipment, materials and supplies, and 10 per cent for purchase and installation, and plus 10 per cent of

one year's rent as compensation for negotiating leases, etc. (R .....).

In the first paragraph of the contract the Company agreed that within fifteen days after the City procured an approving opinion of legal counsel concerning its authority to "issue and sell the public market utility certificates authorized by Ordinance No. 61192" it (the Company) would resume active construction of a market building on the land mentioned in the contract. (R .....).

The ordinance here referred to begins with the statement: "To provide funds for the purpose of purchasing and establishing a public market as a public utility, public market utility certificates shall be issued by the City * * *" in an amount not exceeding $2,500,000.00. Subsequent provisions specify the form of the certificates and of the coupons, all to be secured by a trust mortgage constituting "a first lien against the land, building * * * and the net revenues * * *" such certificates not to be general obligations of the City but to be paid only from the net revenues of the property, and the certificates to be "advertised and sold to the highest responsible bidder for cash, the Council reserving the right to reject any and all bids tendered therefor." (R ..... and .....).

The contract provisions for conveying the property to the City are in paragraphs 3, 6 and 8 which, in part are:

(3) "The Company agrees that upon the completion of said public market building and the purchase and installation therein of the equipment, materials and supplies described in said Exhibit "A", and as first approved by the Council, it will convey to the City by warranty deed (and by bill of sale with relation to movable fixtures and personal property) good and marketable title to the following described property. * * *" (R .....).

(6) "Upon the completion by the Company of its obligations under this agreement, and at the time of the tender by the Company to the City of proper conveyances of said property and assignments of its leases, contracts and insurance policies affecting said premises, the City shall accept said conveyances and said assignments and shall pay to the Company the sum of $1,244,790.66; and as of the date of said conveyances and assignments and of the making of said payment by the City to the Company, there shall be an accounting * * *. *All payments due from the City to the Company hereunder, if unpaid to the Company when due, shall thereafter bear interest at the rate of six per cent (6%) per annum, payable quarter annually.*" (R .....).

(8) "From the date of the execution and delivery of this agreement until completion of its other obligations herein set forth, the Company agrees that it will perform leasing service for the procuring of tenants for said public market building, the identity of such tenants and the terms and conditions of their tenancy to be subject to the approval of the City through its Council, *and agrees that before the City acquires said public market building it shall be so occupied as to be a going public market utility.* * * *" (R .....).

The above provisions as well as the provisions referring to Ordinance No. 61192 concerning the issuance and sale of utility certificates eventually brought about controversy and litigation which terminated, in so far as the state courts are concerned, with the judgment or decree above mentioned after the case had been converted from a suit for specific performance of the contract to a case for damages as in tort without allegations specifying acts of negligence, and damages proximately resulting therefrom.

Other provisions of the contract which concern the purchase of equipment, materials and supplies, the making of leases, adding extras in the building during construction, etc., without Council approval also involved some controversy, in so far as these features added to the "contract price". No further mention need be made of them at this time.

The building construction did not go forward until the Company, early in 1933, obtained a loan from RFC on the basis of bonds representing $775,000.00 (discounted 6½%, making the result $724,625). (R .....). On December 15, 1933, the building was sufficiently completed for use, the Company had obtained equipment, materials, supplies and lessees and on that date began operating the property as a public market utility, without giving the City possession or offering any conveyance whereby the City might make a mortgage and issue utility certificates as provided by Ordi-

nance No. 61192 until November 9, 1934, when the Company, having concluded that the contract in reality created a general obligation on the City to pay in cash (whether or not utility certificates could be sold as provided by the ordinance) made a so-called tender of title papers. The City Council on November 14th rejected the "tender" by adopting a motion which recited that the City "recognizes no duty upon its part to comply with any terms of any alleged agreement between it and the Public Market Company and particularly with reference to that document dated October 28, 1931. * * *." (Book of Ex. pp. 299 and 230). The City Council by using the term "alleged contract" plainly had reference to the contract as a general obligation, which the Company was then claiming it to be. Nevertheless, the Company, and afterwards the court, refers to this as a repudiation of the contract. (R p. ..... and .....).

During the eleven months which elapsed between the time the market was opened and the time of the so-called tender to the City a great deal happened,—high salaries of officers, poor management, friction with lessees and stall renters, operating losses amounting to $11,000.00 per month, failure to submit proper data to the City Council for its approval of leases, purchases of equipment, building changes, etc., all of which tended to make a sale of certificates as proposed impossible during a financial depression

as then prevailed, and difficult in prosperous times. (R....).

The Company, shortly after the City's refusal of the alleged tender, entered suit against the City for an accounting and for specific performance of the contract on the theory that the City had assumed a general obligation. The case came to grips upon a demurrer to the second amended complaint for want of sufficient facts to support a suit in equity for specific performance. The Company, in the complaint and subsequent argument, took the position that the contract which was fully set out in the complaint created a general obligation on the City. The City opposed this, maintaining that payment was to be made only from a special fund which might be created in the manner provided by Ordinance No. 61192 above mentioned and that the complaint failed to show that this fund had been or could be created at the time of the alleged tender. The Court sustained the demurrer, and, no further amendment being offered, entered a decree dismissing the case. On appeal the Supreme Court of Oregon reversed the action of the Circurt Court, holding that the contract, as shown by the complaint created a general obligation on the City. (See 160 Or. 155; 82 P. (2d) 440.)

The City then, pursuant to leave of court, filed an answer admitting the contract but denying that it created a general obligation or that the Company had fully performed. By

further and separate answer the City alleged facts showing, that it had no funds for the purchase of a market property such as that proposed by the Company, no sufficient power of taxation to raise the money and no power to incur an indebtedness without an approving vote of the people; that the contract was drawn with the purpose of making the obligation of the City payable by utility certificates as authorized by the City charter and provided by Ordinance No. 61192 mentioned in the contract; that the parties at and prior to the time of signing the contract agreed upon this method of payment; that the Company's officers subsequently confirmed this understanding and that the contract would be void if construed as a general obligation. (R .....). In consequence of this, the City prayed that the contract be construed as creating no general obligation to pay, but, if construed as creating a general obligation, it be reformed in accordance with the agreement. The City further alleged that the utility certificates were not marketable and the City had no other means of obtaining funds for paying in the event of a decree of specific performance. The Company, RFC and the Bank severally denied for the most part the affirmative allegations of the City. (R .....).

The case came to trial before the Honorable Fred W. Wilson, Circuit Judge for the County of Wasco, who was assigned to Multnomah County to hear and determine the

case. It was stipulated that the accounting matter be postponed until after a trial and determination of the issue concerning the nature of the City's obligation. Much evidence and many exhibits were then presented showing in great detail the negotiations and discussions between the parties prior to the time of drafting the contract, the details of the drafting, the discussion which occurred at a public meeting between the contracting parties and others concerning the wording of the contract and its sufficiency to protect the taxpayers by providing that payment by the City could be only from a special fund, the statements of Company officers and City officers that the contract was so drawn, subsequent statements by the Company's officers to the same effect, the Whitbeck litigation, the City's indebtedness, its limited taxing power, non-salability of certificates as proposed, and other matters, all tending to show that the contract should not be treated as a general obligation; that the Company had failed to create a "going public market utility" within the meaning of the contract and therefore specific performance should not be decreed. (Book of Exhibits, pp. 1-416 and 171 Or. 522; 138 P. (2d) 916).

Judge Wilson, after briefs and argument were submitted, found that the contract created no general obligation on the City, and that the property was not a going public market within the meaning of the contract. (R.....). The Company, failing to further amend its complaint and

having made no claim that the City should be required to issue and sell utility certificates in order to raise such amount as might thus be provided, a decree was entered dismissing the case. (R .....).

The Company appealed to the Supreme Court which held, from the evidence received by Judge Wilson, that the contract should be construed as creating no general obligation on the City to pay; that the Company had fully performed its obligations under the contract and that the court should determine what relief should be granted to the Company. The opinion of the Supreme Court then proceeds to state that the Company should obtain relief on the theory advanced by it and that the measure of relief should be the same as in local improvement cases except that, inasmuch as payment could not be made by a decree requiring the City to sell utility certificates, the damages should be the contract price less the value of the property at the time the City refused the "tender" and that additional damages should be allowed by way of interest from the date of such refusal. The opinion further provided that the case be remanded to the lower court which should give leave to amend the pleadings, take evidence and then determine the contract price and the value of the property at the time the City rejected the "tender". (R .....; 171 Or. 522; 130 P. (2d) 624.)

After entry of the mandate in the Circuit Court the Com-

pany, taking the view that everything said by the Supreme Court was law of the case, filed a third amended complaint which incorporates all of the allegations of the second amended complaint and adds allegations to the effect that the City took no steps to create the special fund for payment; that on November 14, 1934, the Council adopted the motion above mentioned; that the City has since said date refused continuously to perform or to recognize any obligation under said contract; that the value of the property on that date was not more than $550,000.00, and that, if specific performance is not available, the Company would suffer damage, "by reason of said breach and repudiation of contract", in a sum equal to the total amount payable under the contract less the value of the property remaining in its possession on said date, and that the Company had no plain, speedy or adequate remedy at law or otherwise than in a court of equity. In the prayer a fifth paragraph is inserted to the effect that, if specific performance be not available, the Company have judgment for the total amount found due upon an accounting less such sum as shall be found to be the value of the property tendered at the time of refusal with interest at six per cent per annum from November 14, 1934. (R .....).

The City, taking the view that the portion of the opinion by the Supreme Court which referred to the Company's remedy, the liability of the City, and the measure of dam-

ages, was suggestive rather than an adjudication, but, if intended as an adjudication, it was void because it was beyond the jurisdiction of the court and in violation of the 14th Amendment of the federal Constitution, filed an answer which, aside from incorporating by reference the answer previously filed (R .....) concerning the case as one for specific performance, denied the new allegations (except the motion passed by the Council), and then set up further and separate defenses to the effect, (1) that the value of the property on November 14, 1934 was in excess of the amount payable under the contract; (2) that the utility certificates provided for by Ordinance No. 61192 were not at any time after October 31, 1931, readily salable at any price and could not in any event bring a price in excess of 30 cents on the dollar; that the Company operated the market property from December 15, 1933, to November 14, 1934, and thereafter as a public market but so negligently and incompetently operated as to sustain substantial losses on account of which, together with the condition of the bond market, the certificates could not have been sold on November 14, 1934 or at any date thereafter for a price in excess of 20 cents on the dollar; that the City had previously had no occasion to set these matters up as a defense against the Company's previous claims, and if not permitted to set them up in answer to the third amended complaint the 14th Amendment of the Federal Constitution would be violated and the City's privilege would be abridged and it

would be denied equal protection of the laws and deprived of property without due process of law; (3) that the Company in its alleged tender demanded that the City pay in cash a sum in excess of $1,250,000.00 irrespective of any price that could be realized by a sale of utility certificates provided for by Ordinance No. 61192 as the source for paying the Company, and the Company thereafter breached its contract with the City and excused the City from further performance (and here allegations concerning the City's constitutional rights were also included); (4) that the Company prevented the City from selling the utility certificates by certain negligent acts, in consequence of which inefficiency, heavy and unnecessary expense and loss followed when there should have been a profit, and (5) that the Company, in a certain case in said court between it and the City which concerned a taking of a small strip of land, unoccupied by the building, for a street widening, set up as its damages for such taking that the full value of said premises, a part of which was being taken, was in excess of $2,300,000.00, and that said street widening caused a complete loss of said premises to the Company, and, in said answer, it is alleged that the Company was therefor estopped from asserting a smaller value as of November 14, 1934. (R .....).

In each of the third, fourth and fifth further defenses

the allegations concerning the City's constitutional rights are embraced as in the second.

RFC and the Bank filed answers and cross-complaints containing allegations similar to those set up in the Company's third amended complaint, except that the prayer was for a payment to the Bank for RFC from the amount of recovery made by the Company against the City, of an amount sufficient to discharge its mortgage. Replies were filed by the Company, RFC and the Bank against the City's further and separate answers and defenses denying substantially all of the allegations. (R .....).

The case then came on for trial before the Honorable James W. Crawford, Judge of the Circuit Court for Multnomah County. A question soon arose concerning the scope of the inquiry. The court ruled in accordance with the Company's theory that everything said in the previous opinion of the Supreme Court became the law of the case and that the City was therefore barred from presenting any evidence in support of any of the allegations contained in its further and separate answers and defenses but that the City would be permitted under the equity rule to introduce evidence concerning these matters although such evidence would be entitled to no consideration. (R.....
.....)

As the trial of the case unfolded concerning the value of the property as of November 14, 1934, testimony was

produced by the Company to the effect that the building, equipment, etc., were not adapted to a use other than for operating a public market; that the market operation proved to be unsuccessful, in consequence of which the property was left on the Company's hands without value except a salvage value of $400,000.00 to $500,000.00 (R .....). The City's expert witnesses on value held to the opinion that the Company took when it was negotiating the contract with the City, viz., that the location was suitable; that the building, equipment, etc., as planned were likewise suitable and that a market operation there should be successful, in consequence of which the property on November 14, 1934, had a value approaching its cost (the amount of the contract) except that this value was somewhat impaired by lack of reasonable diligence on the part of the Company in handling and operating the market. Five expert witnesses on value testified to this effect. (R .....). Two other men who were experts in handling and managing large food markets, although not testifying as to the value of the property, testified that the entire property as planned and placed in operation was suitable for a food market operation of the type planned and would have been successful by the application of experienced management and operation. R .....). This evidence went in without special objection in so far as it might be considered as bearing on the value of the property but not as in support of the further and separate answers above mentioned.

Two other witnesses who were experts in the line of selling securities including certificates of the type provided for by Ordinance No. 61192 were called by the City. Objection was raised against their testimony concerning the non-salability of the certificates on or at any time near November 14, 1934. The objection was sustained on the ground above stated, viz., that the scope of inquiry necessitated the exclusion of such evidence. (R .....). Nevertheless, they were permitted to testify under the equity rule and on the basis above stated. Their testimony showed that the certificates, if the entire amount of $2,500,000.00 had been secured by a mortgage on the property as proposed and offered for sale, would not have brought in excess of $750,000.00 in view of losses experienced by the Company's operation and the poor market for such securities at the time. (R .....).

Much other evidence was offered showing numerous acts of neglect on the part of the Company during its possession and operation of the market through the eleven months' period prior to November 14, 1934, and also afterwards, which had a depressing effect upon the success of the market operation and the salability of the certificates. This evidence also was excluded from consideration, although put in the record under the equity rule. (R .....).

Other evidence which had been introduced by the Com-

pany was also pointed to by the City as showing negligence on the part of the Company which rendered impossible the making of a mortgage for securing the certificates or issuing and advertising them for sale. This evidence was in part disclosed by the Company's "offer" whereby delivery of title papers could not be obtained without first making payment in cash, whereas the plan for payment necessitated a delivery of title papers first so that the mortgage could be made and utility certificates backed by the mortgage and the revenues to be obtained from the property could be issued, in order to obtain the funds from the sale of such certificates with which to purchase the property.

The accounting feature was of minor consequence for a stipulation was made which covered all of the items and the amounts, subject to court determination concerning the legal phases. The result of the trial was a decree as above indicated.

The City appealed to the Supreme Court which likewise ruled with the Company, taking the view that Judge Wilson had reopened the case and heard further evidence concerning the subject of negligence (which was an error of fact); that the previous decision of the court had properly placed restrictions on the scope of the inquiry on the subsequent trial before Judge Crawford; that the language then used concerning the matter of a remedy for the Company, the liability of the City for damages, the measure of damages

and the restricted inquiry, constituted law of the case at the further trial before Judge Crawford. The Supreme Court, as above indicated, took the further view that the amount of damages allowed by the lower court was insufficient. The Court thereupon increased the amount so that the judgment against the City at the time of entering the mandate was $1,135,676.07 on September 17, 1946, although the City had no power to enter into a contract or otherwise incur an obligation like that here imposed, the City (and the Company as well) had executed a contract which provided for avoiding such obligation, the City had discontinued the Carroll Public Market about the time the Company had completed the building, and the Company was permitted to retain all of the property including the income during and after the market operation.

JURISDICTIONAL STATEMENT

It is contended that the Supreme Court of the United States has jurisdiction to review the judgment here in question by virtue of Article III, Section 2 of the United States Constitution and amended because the rulings above mentioned by the Circuit and Supreme Courts of Oregon deprived the City of a right under the 14th Amendment of the Federal Constitution, viz., a right to have due process of law,—a right to know before trial that a case in tort for damages was to be presented in addition to a case on con-

tract for specific performance; a right to have definite specifications beforehand of what were to be charged as negligent acts proximately causing damage to the Company and showing the amount of damages resulting therefrom; a right to have a fair opportunity to make countercharges showing that the proximate cause of the alleged damages was negligent acts of the Company and that the Company, because of certain acts, was estopped from asserting damages as claimed; a right to have a fair trial on issues thus framed and without having the scope of inquiry so limited as to prevent the City from showing that it was not negligent and that the failure of payment was due to negligent acts of the Company.

THE QUESTION PRESENTED

The question here presented is whether or not the City of Portland shall be allowed to present to this court a showing that under the 14th Amendment of the Federal Constitution it has a right of fair trial on charges to be previously made concerning its supposed negligence and the damages proximately resulting therefrom, and upon countercharges showing acts of negligence on the part of the Company which constituted the proximate cause of nonpayment to the Company, and failure of the City to acquire the market property, equipment, materials and supplies which it expected to acquire in lieu of the Carroll Public Market.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The reasons relied upon for the allowance of the Writ of Certiorari prayed for in this matter are:

(1) That the Supreme Court of the State of Oregon has decided a federal question of substance not heretofore determined by this court;

(2) That such decision is not in accord with the applicable decisions of this court, and

(3) That the case presents a matter of great public importance in this,—that all cities and other governmental bodies and all taxpayers in Oregon will, unless relief is granted by this court under the Fourteenth Amendment, be stripped of every protection which has been provided or may be provided by statutory, constitutional and charter provisions.

If the decision of the Supreme Court of Oregon be permitted to stand as it is and without relief from this court, it will be a precedent throughout the entire country. Other cities and municipal corporations will be subject to the same predicament in which the City of Portland now finds itself. In fact unscrupulous promoters and public officials lacking in sound business judgment or overly ambitious will be afforded a means of avoiding all restrictions upon public indebtedness and taxation.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directed to the Supreme Court of the State of Oregon, commanding said court to certify and send to this Court a full and complete transcript of the record of the proceedings of the said Supreme Court of Oregon had in the case numbered and entitled on its docket, No. 4231, Public Market Company of Portland, Respondent, Cross Appellant, vs. City of Portland, Appellant and Cross Respondent, and Reconstruction Finance Corporation and The First National Bank of Portland (Oregon), Respondents, Cross Appellants, to the end that this cause may be reviewed and determined by this Court as provided for by statute; and that the judgment herein of said Supreme Court of Oregon be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated, November 30, 1946.

THE CITY OF PORTLAND, Petitioner,
JAY BOWERMAN,
Yeon Building, Portland 4, Ore.
LYMAN E. LATOURETTE,
MARIAN C. RUSHING,
City Hall, Portland 4, Ore.
Counsel for Petitioner.

In
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Court Below

The opinion of the Supreme Court of Oregon (R) is reported in 170 P. (2d) 586. For prior opinions see 171 Or. 522; 130 P. (2d) 624; 138 P. (2d) 916; 160 Or. 155; 82 P. (2d) 440.

Jurisdiction

1. The date of the decree to be reviewed is June 25, 1946. (R). A petition for rehearing was filed August 20, 1946, within time as extended (R). The court denied the petition September 10, 1946, and sent a

mandate to the Circuit Court on the 11th (R). The time within which a petition for a writ of certiorari may be filed with the clerk of this court is three months from the date of the denial of a petition for rehearing in the court below in case such petition has been timely filed, as here (Schlosser v. Hemphill, 198 U. S. 173, 175, 49 L. ed. 1000, 1002, 25 S. Ct. 654; United States v. Ellicott, 223 U. S. 524, 56 L. ed. 535, 32 S. Ct. 334; Morse v. United States, 270 U. S. 151, 70 L. ed. 518, 46 S. Ct. 241; Coe v. Armour Fertilizer Wks., 237 U. S. 413, 418, 59 L. ed. 1027, 1029, 35 S. Ct. 625; United States v. Seminole Nation, 299 U. S. 417, 81 L. ed. 316, 57 S. Ct. 283).

2. The statutory provision which is believed to sustain the jurisdiction of this court is section 237(b) of the United States Judicial Code as amended, which provides for certiorari to the highest court of a state "where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution * * * of * * * the United States" as well as Article III, Section 2 of the United States Constitution.

3. The facts which show that the nature of the case and the rulings below were such as to bring this case within the jurisdictional provisions relied on are as stated in the foregoing petition for a writ of certiorari, reference to which is hereby made, especially to pages 1 to 21. Additional facts as thought important to give the court a full understanding

of the matter will be stated below in connection with the argument.

4. The cases believed to sustain said jurisdiction are as follows:

The cases most nearly applicable are believed to be: Coe v. Armour Fertilizer Wks., 237 U. S. 413, 418, 59 L. ed. 1027, 1029, 35 S. Ct. 625; Gorman v. Wash. Univ., 316 U. S. 98, 100, 86 L. ed. 1300, 1302, 62 S. Ct. 962; Osment v. Pitcairn, 317 U. S. 587, 87 L. ed. 481, 63 S. Ct. 21.

Other cases sustaining the jurisdiction here claimed are: Schlosser v. Hemphill, 198 U. S. 173, 175, 49 L. ed. 1000, 1002, 25 S. C. 654; La. Nav. Co. v. Oyster Com., 226 U. S. 99, 101, 57 L. ed. 138, 140, 33 S. Ct. Rep. 78; Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 214, 53 L. ed. 765, 768, 29 S. Ct. 430.

Statement of the Case

This has already been given in a chronological manner in the preceding petition for the writ under the headings, Summary Statement of the Matter Involved, Reasons Relied on for the Allowance of the Writ, and Questions Presented (pp. 1-21; 23 and 24), all of which is adopted and made a part of this brief.

An additional statement should, as we think, be made as follows: The case involves three very important subjects, (1) the right under the 14th Amendment of the Federal

Constitution of a citizen to have a fair trial on any controversy involving a substantial right; (2) the nature of such right as being substantial, and (3) that this city and all cities and other governmental bodies, and all citizens who are taxpayers, have a substantial interest in the matter here involved because it concerns the power, by judicial action, substantially to nullify charter, legislative and constitutional restrictions on the power of taxation and indebtedness.

In order that the court may quickly see how these points are involved we will follow with a specification of errors on the part of the Supreme Court of Oregon and on the part of the lower court at the last trial, and then follow with an argument which will at the same time cover the assignment of errors collectively and the points above mentioned.

Specification of Errors

The Supreme Court of Oregon erred, as we maintain, in the following particulars:

The overall error is the conversion of the case from one on contract for specific performance to a case for recovering damages ex delicto for *supposed* (all italics are ours for emphasis) negligence, fixing the measure of damages and requiring the court below to assume negligence and follow that measure of damages without previous allegations specifying the negligence acts and the amount of the alleged damages proximately resulting therefrom, or giving the

City an opportunity to justify its actions and show negligence on the part of the Company which constituted the proximate cause of its supposed damage.

This general error was the result of particular errors which we will detail as follows:

(1) In holding that the Company had fully performed the contract on its part.

(2) In holding that the City had wrongfully repudiated the contract.

(3) In holding that the Company was entitled to relief by way of damages in case the proofs showed that the contract price exceeded a reasonable value of the property as of November 14, 1934.

(4) *In holding that the lower court, in taking such proof, must restrict the scope of inquiry to the amount payable under the contract less the value of the property as of November 14, 1934.*

(5) *In holding that the damages determined on this basis be supplemented by adding interest at 6 per cent per annum from November 14, 1934.*

(6) *In holding that the true measure of damages was not to be based upon the amount for which the utility certificates might have been sold if the entire amount authorized had been placed on sale in the manner provided by the authorizing ordinance.*

(7) *In holding that it (the Supreme Court) had jurisdiction, after having determined that the Company was not entitled to specific performance, to make a determination that the plaintiff was entitled to relief and at the same time fix the character of relief and measure thereof to be given on a further hearing, limited solely to that issue.*

(8) In holding that portions of an opinion which were not necessary to a decision and therefore dicta, such dicta in effect converting a suit in equity for specific performance to a claim for damages ex delicto although there were no pleadings or proof to support such theory, became the law of the case thereby limiting the judge of the court at the subsequent hearing to the sole issue of damages.

(9) *In holding that such course would not deprive the City of due process of law in violation of the 14th Amendment to the Federal Constitution.*

(10) In holding that the views previously expressed (for which see 171 Or. at pages 579-696) became binding upon the parties and restricted the inquiry as noted.

(11) In holding that when the case was previously on trial (before Judge Wilson) he, after holding that the contract imposed no general obligation on the City, *reopened the case and took further testimony,* notwithstanding the record to the contrary (R).

(12) In erroneously assuming that the supposed

further testimony was in the record and applied to the questions concerning the relief which should be afforded to the Company and the measure of such relief.

(13) In holding that it (the Supreme Court) did not exercise original jurisdiction when it denied the City its day in court by deciding in a suit ex contractu that the City was liable in damages ex delicto and fixed the measure of damages to be followed on a further hearing in the lower court, thereby barring the City from its right to defend against a claim for damages never made by the Company and therefore not defended against by the City.

(14) In holding that the facts showed that the plaintiff was entitled to a remedy, and proceeding to fix the remedy.

(15) In holding that the nature of that remedy was squarely presented by the record before the court when the remedy was declared, notwithstanding the record to the contrary (R).

(16) In holding that there was no evidence of a different character before it at the time of the last hearing, (see 42 Or. Ad. Sheets 873, 170 P. (2d) 586) than what was before it at the time of the previous hearing (R).

(17) *In holding that the relief to which the Company was entitled was fully presented on the former appeal and there was no merit in the proposition that the requirements of due process of law had not been met.*

(18) In holding that performance of "the contractual duty of the City to provide the fund by the issuance and sale of public utility certificates" was not prevented by the Company.

(19) In holding that the Company did not prevent the City from giving a mortgage to secure utility certificates or from issuing and offering the certificates for sale and that this question was substantially the same as was *"raised by the pleading and argument on the former appeal and was necessarily decided adversely to the City."* (R).

(20) In holding that there were two tenders of conveyance to the City, and that the second was met by a flat repudiation of the contract and of any obligation under it whatever.

(21) In holding that "the tender conforms strictly to the provisions of paragraph 7 of the contract," and even though it could be said to be defective for the reasons assigned by the Company, the defect was waived by the City's repudiation of the contract.

(22) In holding that the record made at the trial before Judge Wilson "explored every phase of the controversy except the accounting and the value of the property", thereby implying that the record then made explored the Company's subsequent claim that the City was liable in damages for supposed negligence. (R).

Further errors of a less important nature need not be mentioned here.

ARGUMENT

Summary Statement

Point A.

The Supreme Court of Oregon violated the 14th Amendment of the Federal Constitution.

Point B.

The City as a result will suffer injury to the extent of approximately one and one-quarter million dollars if relief is not obtained from this court.

Point C.

This case involves a matter of great public importance because of the nullifying effect that it now has upon all efforts, by constitutional, statutory or charter restrictions that have been heretofore made and which may hereafter be made, to maintain governmental activity on a pay-as-you-go basis.

PREFACE

As a preface to the argument we call attention to the fact that when the case was on trial before Judge Wilson (the first trial) the all important question was whether the contract provided for a general obligation on the part of the City to pay, or a special obligation payable only from a sale of utility certificates if a sale could be made. Under the charter of the City of Portland (Sec. 10-104 of 1942 Compilation) the City is authorized to issue and sell interest bearing public utility certificates for construction or acquisition by purchase or otherwise of any public utility within the city. Such certificates "* * * shall be secured by a mortgage or mortgages upon such public utility plant and the revenues thereof, but the same shall not be a general liability of the City and shall be paid solely from the revenues derived from the plant or from the sale thereof." Such certificates were contemplated in the contract which is set forth in the supplementary portion hereto. The evidence centered in great detail on the circumstances under which the contract was drawn; the discussions that took place between the Company's officials and the City's officials at the time of preparing the contract (and this embraced a study of the different drafts of contract that were prepared); the interpretation given to the contract by the Company's officials and the City officials after the final draft was made and immediately before signing; subse-

quent statements by Company officials to the effect that the contract could not be a burden on the taxpayers of Portland because the City was obligated only to pay for the property by issuing utility certificates and such certificates were payable only from the property itself; statements in the Whitbeck case by the pleadings, argument and brief; the constitutional and other restrictions on the tax levying power of the City Council at the time the contract was made and subsequently, and charter provisions concerning the budget system and expenditures, thus placing the City on a strictly cash basis and keeping it within the limits of its budget; and the amount of city indebtedness and the special limitation applicable when purchasing a public utility. (See 171 Or. 533-578 and R).

The record of that trial also involved a controversy concerning performance on the part of the Company, it being alleged by the Company that it had fully performed on its part. This was denied by the City. The main portion of this controversy related to the covenant that the Company make the property into a "going public market utility" prior to conveying it to the City. This was construed by the Company as requiring nothing more than having the building completed, the doors opened and the building occupied in some part by persons having food for sale and the City claiming that it required not only that, but a showing of such occupancy as to yield an income sufficient reasonably

to warrant investors in securities to purchase the proposed certificates, whereas the Company's operation through a period of eleven months showed a failing enterprise to the extent of $11,000.00 per month (R and).

There was no allegation in the complaint on which the case was tried before Judge Wilson indicating in the least that the Company expected to hold the City in damages for a breach of contract or that it expected to require a specific performance by way of issuing and advertising certificates for sale or that any other theory or basis of relief would be sought. There was not the slightest indication that, if specific performance could not be obtained on the theory that the contract imposed a general obligation upon the City, a type of relief would be claimed such as that asserted in the Supreme Court upon the appeal by the Company from Judge Wilson's decree dismissing the case,—such relief to be based upon the theory of damages ex delicto by which is meant a case as in tort based on allegations of negligent acts on the part of the City proximately resulting in damages to a certain amount to the contractor, and with opportunity for the City to make a defense on denial of such negligence and proximate damage, and show that the damage, if any, sustained by the contractor, was the proximate result of negligence on its part. (R).

When it appeared from the evidence taken before Judge Wilson that the contract would be ultra vires and void if

construed as creating a general obligation on the City, the case had gone as far as it could under the theory and allegations of the second amended complaint. This is true because the court on that state of the record had no other basis for granting relief without violating the 14th Amendment of the Constitution even though it be assumed that the Company had fully performed all of its obligations.

This is the crux of the accompanying petition whereby the City seeks the protection afforded by the Federal Constitution. Apparently the Supreme Court was confused concerning the state of the record and the matters which had been litigated before Judge Wilson. Such confusion may have resulted in part from the controversy between the parties as to whether the Company had fully performed its part of the contract by making the property into a "going public market utility" and in part (perhaps chiefly) by the erroneous thought that the record showed that Judge Wilson after reaching this conclusion had allowed the Company to reopen the case and take further evidence on an assumed issue of negligence as in tort, although the certification to the Supreme Court of the record of proceedings before Judge Wilson showed no such new issue and showed no evidence taken on such theory (1st Tr. ; R).

POINT A

Right of Fair Trial

The right of fair trial is an elementary and fundamental right inherent in civilized government. The 14th Amendment merely puts in words what had previously existed in Anglo Saxon and Aryan culture when not obstructed by kings or other rulers. Our American jurisprudence as controlled by this court has revolved about this central precept. No citation of authority need be given except to show that the fundamental rule was in this case violated and to show further that the violation, if it go unchallenged, may result in many other violations of a similar character. This result is manifestly true because of the fact that, when the principle is violated by a state court of last resort, there is no alternative except submit to the infraction or incur the expense of bringing the matter to the attention of this court for correction.

No case has been found where an infraction of the principle has occurred by a court on all fours with this case. A ruling found most nearly applicable to our case (as the result of considerable search) is Coe v. Armour Fertilizer Wks., 237 U. S. 413; 59 L. ed. 1027; 35 S. Ct. 625. This case applies to two of the points in the case at bar,—viz. (1) that a right to request this court to grant relief does not arise where the case has been remanded for further trial until after such retrail and a final disposition of the case, and (2)

that if the opinion and mandate of an appellate court, which authorizes the lower court to retry the case, restricts the new trial so that the defendant does not have fair information concerning the charges, opportunity by proper evidence and argument to resist such charges, make and substantiate counter charges, the law of due process has not been followed. The case involved a state statute which gave a judgment creditor against a corporation the right to an execution against a stockholder to the extent of the unpaid subscription on his stock, the fact to be ascertained from the company's books by the Sheriff. The trial court, upon application of the alleged stockholder for an order quashing the writ ordered it quashed but not on the ground that the statute was unconstitutional, taking the view that the writ was improperly issued without some preliminary steps. On appeal the ruling was made that the statute required no preliminary steps and that there was no general law or rule requiring previous notice to the stockholder; that the stockholder became such with knowledge that, under the statute, upon a return of nulla bona, an execution might issue against him for his unpaid subscription, and that the statute afforded the means whereby the Sheriff could obtain definite information as to the stockholders and the amount of their unpaid subscriptions. The mandate to the Circuit Court was that further proceedings be had "as, according to the writ, justice, the judgment of the Supreme Court, and the laws of the state of Florida ought to be had."

The Circuit Court then denied the motion to quash. On appeal by Mr. Coe it appeared that he did not claim that he was not a stockholder nor that there remained no balance due on his stock, but he stood "boldly on his attack upon the constitutionality of the act." This court, after having allowed a writ of error, reversed and remanded the cause for further proceedings not inconsistent with the court's opinion which was to the effect that:

> "* * * before a third party's property may be taken to pay that indebtedness (of the corporation to its creditor) upon the ground that he is a stockholder and indebted to the corporation for an unpaid subscription, he is entitled, upon the most fundamental principles, to a day in court and a hearing upon such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself."

As to the suggestions that the stockholder's property was not actually seized; that he knew of the execution, and had an opportunity to present the merits of his objection on his motion to quash, this Court said:

> "The fallacy of this is that *it ignores the issue of law raised by petition of plaintiff in error, and substitutes an issue of fact for which he was not summoned and which he has not consented to litigate.* * * * Nor can extra-official or casual notice, or a hearing granted as a matter of favtor or discretion be deemed a substantial substitute for the due process of law that the Constitu-

tion requires." (pp. 423 and 424 of 237 U. S.; 1031 and 1032 of 59 L. ed.).

A case quite in point is Waggoner Nat'l Bank v. Welch, 164 Fed. 813, 816; 90 C.C.A. 589, where an attempt was made after a case was tried to change from a theory of tort to a theory of contract (the reverse of the case here at bar). The Court at page 816 said "A valid judgment must accord with the allegations and prayers of the pleadings and determine the issues which they present."

Allen v. Pullman Palace Car Company, 139 U. S. 658, 662; 35 L. ed. 303, 304; 11 S. Ct. 682, was a case where attention was called to the fact that the prayer of the complaint included a general prayer for relief (as in this case) but the court held that this was not sufficient to warrant relief different from that warranted by the allegation of fact. The court at page 662 of 139 U. S. said:

> "It is true that there was a prayer for general relief, but relief given under a general prayer must be agreeable to the case made by the bill, and in this instance the complaint sought a preventive remedy only."

In Kelsch v. Miller, 73 N. Dak. 405, 15 N. W. (2d) 433; 155 A. L. R. 1186, which was an action to determine adverse claims to certain land, the court had this to say about an effort in the Supreme Court to present questions that were not raised in the trial court and which were foreign to the theory on which the case was tried (quoting

from another North Dakota case, page 1198 of 155 A.L.R.):

> "The rule is elementary that where the parties act upon a particular theory in the trial court, they will not be permitted to depart therefrom when the case is brought up for appellate review. This is true of the construction placed upon pleadings. 3 C. J. p. 725. It is true as to the relief sought and the grounds therefor. 3 C. J. 730. It is true generally as to the theories acted upon by the parties in the court below. See 3 C. J. 718, et seq. A party cannot proceed with a trial upon one theory and advance another and inconsistent theory on appeal. * * *."

This is but a statement of the rule generally applied throughout the land (16 C. J. S. 1260 and 1261, "Constitutional Law" sec. 620). It applies most emphatically to the case here because the second amended complaint contained no allegations on which to predicate relief by way of damages ex delicto. The allegations confined the case to a breach of contract calling, as the Company claimed, for a payment of a specific amount as a general obligation (not even claiming alternative relief by requiring the City to proceed with a sale of the certificates, and not setting forth any allegations for relief on the ground of a breach of contract, which would have been a case at law and not in equity).

It has been said that even in an action for damages on a contract, equity may take jurisdiction when a long account is involved, and this was mentioned by the Oregon Supreme

Court when this case was first before it on a demurrer to the complaint (160 Or. 155; 83 P. (2d) 440). The statement was founded upon allegations to the effect that a long and involved accounting was necessary between the parties in order to establish the full amount of the purchase price. When, however, the case came to trial it appeared that all of the data which concerned the full amount of the contract price (cost of equipment, materials and supplies, number of lessees obtained, amount of rental, and all other items) were within the knowledge of the Company. The account proved to be so simple that it was disposed of by stipulation except as to legal phases. Thus it now appears, as it did when the case was before the Supreme Court after the trial before Judge Crawford, that there was no long or involved account and no basis for equity jurisdiction. (R).

The point we emphasize, however, is that the Company never sought relief by way of damages, it never set up allegations suitable for awarding damages ex delicto or damages for breach of contract. The general prayer was, therefore, of no avail.

At and prior to the decision of Judge Wilson the pleadings as to the contract were entirely devoid of any suggestion of damages ex delicto. The Supreme Court, however, stated that the Company was entitled to relief; that such relief should be obtained on the theory followed in street improvement cases, viz., damages ex delicto, and that the

measure of such damages should be the difference between the contract price and the value of the property as of November 14, 1934, in consequence of which the case should be reversed and the parties allowed to amend their pleadings and take evidence to establish the difference between the contract price and the value. (R).

This gave the City warning about what to expect, but still the Company, although amending its complaint and alleging a failure of the City to advertise and sell certificates in order to create the fund, did not set up the amount that it claimed as the contract price although it had all the information from which to state the amount. It alleged the value of the property as of November 14, 1934 to be $550,000.00, although the building alone cost more than this. Nevertheless, the City by its answer denied the substantial part of the new allegations and alleged facts tending to show that by certain acts of the Company the City was prevented from selling the certificates, or even making a mortgage as a basis for issuing them, and the City further alleged that it was entitled under the 14th Amendment of the Federal Constitution to present an issue and have a hearing on these matters. The trial court, feeling bound by what was said by the Supreme Court, ruled that the inquiry was restricted to the rule announced by the Supreme Court, and later the Supreme Court, on the City's appeal, affirmed this decision. (R).

In effect, the decision of the Oregon Supreme Court reversing Judge Wilson, as interpreted by Judge Crawford, which interpretation was affirmed by the Supreme Court, found the City guilty and liable in damages ex delicto and thereby would foreclose the City from having its day in court on these points and showing its defenses, but allowing the Company to prevail without necessity of alleging or proving these points. (R)

Thus, as we respectfully submit the City was denied due process of law.

POINT B

The City as the Result of the Court Action will suffer Damages approximating One and One-quarter Million Dollars.

The judgment rendered together with the accumulated interest at six per cent per annum for twelve years, fixed by the court as a part of the damages already amounts to approximately that sum.

The vice and danger of conducting litigation by changing a cause of action in an equity suit for specific performance of a contract, to a law action for damages ex delicto for the recovery of a money judgment without changing the pleadings and giving the defendant an opportunity

to defend against the claim for damages, is well illustrated by the judgment awarded in this case.

The Supreme Court held with Judge Wilson that the contract did not create a general obligation against the City and would have been ultra vires and void if it did create such general obligation. However, the Supreme Court without pleadings therefor or proof adjudged the City guilty of breach of the contract, and decreed that it was liable for damages resulting therefrom measured by the difference between the contract price and the value of the market property on November 14, 1934. (171 Or. 533-578).

The Company had made a conditional tender of a conveyance of the market property and demanded full payment of the contract price. (R).

This demand was based upon the assumption that the contract did create a general obligation, and the City passed a motion denying such liability. (R).

In deciding the case on appeal from Judge Wilson's decision, the Supreme Court held that the contract required payment to be made from the proceeds of utility certificates secured by a first mortgage on the market property and payable only from the earnings of the operation of the market or the sale of the property .(171 Or. 556-565).

The plaintiff has never alleged that these certificates were ever salable or that the required amount of money

could ever have been procured from this one available source of money.

The contract between the City and the Company required that *"upon the completion* of said public market building * * * it (the Company) will convey to the City by warranty deed * * * good and marketable title to the property". It is alleged (Abstract 11): "The building * * * was completed and ready for use and occupancy on December 15, 1933 * * *." (R).

The record discloses that instead of observing its contractual obligation the Company proceeded to occupy the building itself and to operate a market therein until November 9, 1934, at which time it made its alleged offer of performance or tender of conveyance. (R).

The property at that time was encumbered by a first mortgage securing $774,500 of 10-year bonds bearing 6% interest, which the RFC had purchased at 93½% of par.

During the six and one-half months from December 15 to June 30, the Company had operated this market business at a loss of $11,000 per month. The RFC audit for this period is in evidence in this case and discloses an operating record which would have prevented any normal person from seriously considering the purchase of these utility certificates secured only by this property and its *operating profits.*

This occupancy and operation was voluntary on the part

of the Company. The Company employed a manager at $800.00 per month who was inexperienced in the operation of a market; it paid its inexperienced secretary $300.00 per month during this period; it failed to pay the interest on the RFC loan bonds; it failed to pay the public taxes and maturing City liens against the property; it became involved with its commercial creditors and was sued or threatened with suit on various items, and generally created a condition which would have prevented the sale of these securities. (R).

If this suit had been brought for specific performance of contract and a decree prayed for, requiring the City to sell these securities and thereby raise the purchase price, the City would have been able to set up its defense that the securities were unsalable due to the misconduct of the Company in operating the property at said loss, which would destroy the salability of the certificates.

If this action had been brought or the pleadings amended so as to make an issue of the City's liability for damages in an action sounding in tort, the City could have defended and charged that the Company itself had destroyed the salability of the securities and rendered it impossible for the City to procure the money from the one available source, to-wit, the sale of the certificates.

The Supreme Court in the appeal from Judge Wilson's decision stated that while the City was not liable on a

general obligation for the contract price of the property, it was liable in damages ex delicto for the full amount of the contract price plus 6% interest, less whatever value the property might have had on November 14, 1934.

The case was remanded with instructions to determine one question only, and that was the amount of these damages as above defined and limited.

By this method the City has been denied its constitutional right of having its day in court and, with proper pleadings, having the issues determined, first, was the City liable in damages, and, if so, the amount thereof.

We have the following result of this proceeding conducted as above:

As to taxes, the contract between the Company and the City provided:

> "It shall also be permissible for said title to be subject to taxes and assessments due and payable after November 5, 1931. The Company agrees that it will pay all legal taxes, assessments and interest which become due and are payable after November 5, 1931, up to the time that it delivers title to the City, and the City agrees that it will reimburse said Company from funds derived *from the sale of Public Market Utility Certificates* for all sums which said Company *shall pay* for such taxes, assessments and interest, with interest at six per cent from the date of said *payment or payments.*" (See appendix).

The RFC audits, Defendant City's Supplemental Exhibits 6 and 7, disclose that liens for local assessments were in default in the sum of $36,908.75 (Ex. 7, p. 8) and that taxes for the years 1933 and 1934 were in default in the sum of $31,097.50. (R).

The Supreme Court, in Advance Sheets 42, page 890, affirmed the judgment of the lower court for taxes in the sum of $45,085.03, of which $15,976.62 had been paid, and that the taxes amounting to $29,108.41 had not been paid. These paid and unpaid taxes total $45,085.03. (170 P. (2d) 594).

The Supreme Court held that the Company was damaged to the full extent of all of these taxes, although it had awarded interest on the money paid in the sum of $1,690.55 and then awarded interest on taxes paid and the unpaid taxes at 6% for the twelve years following November 14, 1934. (170 P. (2d) 594 and 595).

No effect was given to the fact that the Company had not paid the taxes nor that the City had never received title to, or any benefit from, the property.

At the time the contract was made the property was subject to liens for street improvements and the intercepting sewer. The contract required a conveyance of a marketable title "but said title to said property shall be subject to the unmatured intercepting sewer and drainage system assess-

ments, which the City assumes and agrees to pay out of the revenues from said public market utility, * * *." (See appendix).

The Company did not pay any of these assessments. It kept its property and all the earnings thereof and never permitted the City to earn anything from this utility out of which to pay these assessments. Nevertheless, the Supreme Court has entered a judgment against the City for the entire amount, to-wit, $121,779.46 together with interest at 6% per annum for twelve years. (170 P. (2d) 594 and 595).

Judge Crawford held that the plaintiff's damage determined in accordance with the rules laid down by the Supreme Court in the appeal from Judge Wilson amounted to $500,000 plus interest at 6% from November 14, 1934. (R).

The Supreme Court on the same evidence and without the benefit of hearing the testimony or seeing the witnesses decreed that the Company's damage was $663,943.96 plus 6% interest from November 14, 1934. (R).

Ordinarily, a debtor is entitled to tender the amount of his obligation and be relieved of liability for interest. In this case tender of the amount decreed by Judge Crawford would have been ineffectual, for the Supreme Court has

found that it was $163,943.96 less than the actual damage suffered by the Company.

This reference to the determination of the amount of damage is of particular interest in view of the fact that the case was tried under a complaint for specific performance of a contract and then judgment awarded for an amount ascertained by the Court without the benefit of formal pleadings alleging the amount of the plaintiff's damage.

Mention may be made in opposition to the City's petition for a writ of certiorari that the City is merely seeking another trial upon matters which have already been tried and determined and that the petition is in effect frivolous. The answer to this is, as above indicated, that the City has had no trial, no issue and no hearing on the subject of damages ex delicto. The trial before Judge Crawford cannot be regarded as a fair trial of the case as one in tort for damages. Indeed, it was no trial at all on such issue, for the trial court, feeling itself bound by what was said by the Supreme Court, held that the evidence tendered on the part of the City showing negligence by the Company which contributed toward the non-salability of utility certificates, mismanagement and negligence on its part which prevented the City from giving a mortgage to secure the cerificates could not be considered although received under the equity rule. Thus the door was closed in the face of the City and the only recourse now available is to seek the protection of this court

because of the right of fair trial vouchsafed by the 14th Amendment.

Another matter which may be suggested in behalf of the Company is that this market project has been a failure; that a great loss has resulted from such failure and that the City is the one who should bear that loss. A full discussion of this matter will be appropriate if the City is given a trial upon the theory of damages ex delicto. Still, lest the court looking now at the general equities of the case be, less inclined to grant relief, we will mention a few facts which are hardly controverted.

The Company started the project as a private enterprise,—a public market under private ownership and management, although the City at the time was conducting a public market under municipal ownership. The Company presented to the City data which it had compiled as a result of much study and consultation with managers of other large market projects, all of whom gave written statements indicating that the project as proposed on the site to be made available by a certain street vacation, and a building to be erected according to certain plans, would be suitable and successful whether under municipal ownership or under private ownership, but likely to be more successful under private ownership than municipal ownership. The City required some substantial alteration in the building plans, but this in any case was necessary because the building

was so located and planned as to cause greater pressure against the harbor wall than was permissible under the easement that had been given, or else add expense of carrying the supporting columns below the wall footings (an expense which would have been practically prohibitive, R). The City suggested a change in the towers so as to give the building a more impressive appearance and carry a better advertising feature. Minor changes were made. The major changes made a substantial increase of cost but the City suggested other changes which made a substantial decrease of cost. The Company, however, raised no objection to these changes (whether increasing or decreasing the cost) although the Company knew at the time that the City had no funds available for the purchase of such market property and was providing for payment by the sale of utility certificates if the City became a purchaser. (R).

Still other changes were made after the building plans were finally adopted and the contract made. Many of these changes were approved by the City. Some of the larger changes were not approved, such as the installation of a heating plant in place of piping heat to the building and using heat furnished by a public utility company, heavy expense for alterations in order to install a sugar mill, etc. The allowance or disallowance of these items, as well as other items of a minor nature, were never passed upon by

the City Council because the Company (as shown by the evidence taken before Judge Crawford under the equity rule) never presented proper data for action. (R).

Other evidence before Judge Crawford taken also under the equity rule, except as it had a bearing on the value of the property as of November 14, 1934, showed that the location and building were suitable for the market project as launched by the contract between the Company and the City and that the enterprise would have been successful if a suitable manager had been placed in control. (R). The Company never offered to give the City the management of the market operation unless the City would pay in cash for the entire property,—and this proposal was after the Company had concluded to hold the City liable as on a general obligation and after the Company had itself assumed management and control as soon as such building and tenants were available. This was done on December 15, 1933, although the building was not at the time fully completed to the satisfaction of RFC. Nevertheless, the Company continued operation for a period of almost eleven months before making any formal proposal to convey the property to the City and during such operation it incurred heavy overhead expenses and so poorly conducted the operation that losses were experienced each month so large that no investor in utility certificates based principally upon

the income from the property would be interested in purchasing (R).

Who then in equity and good conscience should bear the loss? Note in addition, that the City on the strength of the operation assumed by the Company disposed of the equipment constituting the Carroll Public Market which it previously owned and operated. (R).

We have acknowledged, as suggested by the Oregon Supreme Court, that the situation between the Market Company and the City has some elements comparable to the situation between a street improvement contractor and the City where payment is to be made from a local assessment by the City, but at the same time we called attention to the important and controlling differences. These differences we may here briefly mention.

In the latter case the contractor has spent his money for a street improvement and has nothing unless he can obtain relief because the City officials neglected to make the assessment, while in the case here at bar the contractor owns the property which is a good property as shown by the expert market operators with whom the Company consulted before launching the enterprise, and as shown by expert market operators testifying before Judge Crawford (R). In the street improvement cases the City authorities have the undoubted power to make a local assessment for the cost of the improvement by merely following the program set

out by the law, while in this case the City officers could not require investors to invest in utility certificates and this was especially true after the Company had assumed the management and control of the market operation without offering to give the City possession, management or control until its management had become so unsuccessful that utility certificates could not be sold. (R).

Another important feature is the fact that the street improvement cases were decided in Oregon prior to the time that the local budget law was passed, before severe restrictions had been placed on municipal expenditure, taxation and indebtedness (Secs. 69-1101 to 69-1217, Oregon Code 1930 and Article XI, Section 11, of the Oregon Constitution). It is not believed that the theory followed in the local assessment cases whereby the contractor is given a judgment for damages as a general obligation although the contract was made payable exclusively from a local assessment fund, would now be followed in view of the public policy shown by the constitutional and statutory provisions on indebtedness and purchasing power, but rather the improvement contractor would be given his remedy in mandamus to force the municipal officers to make the assessment in accordance with the statute (and this we might suggest is a remedy which the Company always had against the City if the City in fact neglected

anything that it should have performed in the way of selling certificates).

The cases concerning municipal liability by the ex delicto theory may be found in the annotation following Town of Capitol Heights v. Steiner, (211 Ala. 640, 101 So. 45) as reported in 38 A.L.R. 1264, the portion of the annotation especially applicable concerning municipal debt limits in connection with local improvements beginning at page 1277. The Alabama case is the latest of importance in point of time (1924) which has come to our attention. The Court held that the contractor would not be given the remedy by a general fund judgment on the theory of damages ex delicto (see also another annotation in 51 A.L.R. 973).

From the above we respectfully maintain that our Point B is well taken and that the objections which we anticipate will be found without merit.

POINT C

The Case involves a matter of great Public Importance.

We have under Point B discussed this subject to a limited extent and in the petition for the writ shown very briefly the great public importance this case holds not only

for all cities and other municipalities in Oregon but also for cities and municipalities throughout the United States.

If a court can by the theory of negligence ex delicto convert a special obligation contract of a tax levying body into a general obligation judgment notwithstanding the constitutional, statutory and charter provisions which require budgets to be prepared in advance of a tax levy, which require the governing authorities to restrict their expenditures to the items embraced in the tax levy, and which restrict the amount of each tax levy even though budgets have been made up which would exceed the tax levying power, then every means of protection against excessive taxation will be avoided and rendered futile. Other restrictions limiting the amount of liability on general obligation indebtedness and the amount of special fund obligations may be avoided in the same way.

In the City of Portland all these restrictions apply and in addition at the time this contract was made a Tax Supervising and Conservation Commission provided by the state statute had authority to pass upon each budget and proposed tax levy and to strike items of proposed expenditure. Yet, by the decree of the Oregon Supreme Court these restrictions and the public policy reflected thereby will have been largely wiped out and a new public policy established unless relief is given by this Court. (See appendix).

We therefore solicit relief from this court not only on behalf of the City of Portland but on behalf of all other cities and municipalities throughout the State of Oregon, and, we may add, throughout the United States, inasmuch as this decision if permitted to stand will be a precedent which other state courts may be inclined to follow.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

JAY BOWERMAN,
Yeon Building,
Portland 4, Oregon,

LYMAN E. LATOURETTE,
City Hall, Portland 4, Oregon,

MARIAN C. RUSHING,
City Hall, Portland 4, Oregon,
Counsel for Petitioner.

APPENDIX

The constitutional provisions are briefly that:

> "Acts of legislative assembly incorporating towns and cities shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit" (Art. XI, sec. 5), and that "unless specifically authorized by a majority of the legal voters voting upon the question neither the state nor any county, municipality, district or body to which the power to levy a tax shall have been delegated shall in any year so exercise that power as to raise a greater amount of revenue for purposes other than the payment of bonded indebtedness or interest thereon than the total amount levied by it in any one of the three years immediately preceding for purposes other than the payment of bonded indebtedness or interest thereon plus six per centum thereof * * * and any warrants for or other evidences of any such indebtedness and any part of any levy of taxes made by state or any county, municipality or other taxing district or body which shall exceed the limitations fixed hereby shall be void." (Art. XI, sec. 11).

The charter of Portland as passed by the Legislative Assembly in 1903 provides that the Council shall annually

> "levy the amount of taxes necessary to provide for the payment during the fiscal year of all properly authorized demands upon the treasury; but such levy, exclusive of the tax necessary to pay the interest accruing during the year on the bonded indebtedness of the city and exclusive of the sinking fund levy hereinafter provided, and exclusive of the levy for bridges hereinafter

provided shall not exceed for all other purposes the rate of seven (7) mills on each dollar of valuation of the property assessed." (Sec. 114, Special Laws of Oregon, 1903, later sec. 190 of 1926 comp.).

The charter provides:

"No money shall be expended or payment made from any fund of the city, except special assessment funds, until a specific appropriation shall be made therefor * * *."

"The Council shall not authorize any expenditure during any fiscal year, nor shall any liability or liabilities be incurred by or on account of the City of Portland, to be paid in any particular fiscal year (for the payment of which the approval of the Council shall be necessary) which singly or in the aggregate shall be in excess of the revenues received during such year applicable, or made applicable by transfer, to the payment of such liability or liabilities. And nothing contained in this charter shall authorize the enforcement against or collection from said city, on account of any debt, contract or liability, of any sum in excess of the limitations prescribed in this section.

"The city shall issue no warrants or other evidences of indebtedness, except under special assessment funds, unless there is money in the treasury duly appropriated and applicable to the payment of the same on presentation, and all evidences of indebtedness issued contrary to this provision shall be null and void. Any councilman voting to incur any liability or to create any debt in excess of the amount limited and authorized by law, shall be deemed guilty of malfeasance in office, and

for such malfeasance such member of the Council may be removed from office." (Sec. 117

The charter as amended in 1913 further provides:

"No bonds other than bonds for public improvements payable out of assessments upon the property benefited, and sewer bonds if otherwise authorized, shall be issued unless approved by vote of the people at a general or special election at which the question shall be submitted in the same manner as other measures are submitted under the initiative or referendum. * * *." (Sec. 92,—being sec. 227 of the 1926 Comp.).

The charter as amended in 1913 further provides:

"On or before the first Monday in October of each year the Commissioner in charge of each department of the City shall cause to be prepared and furnished to the Council, estimates in writing of the public expenses to be incurred in his department, and each branch thereof, for the ensuing fiscal year, *specifying in detail such probably expenditures.*" (Sec. 85 which is sec. 186 of the charter as compiled in 1926 and sec. 7-107 of the comp. in 1942).

The charter further provides:

"No indebtedness shall be incurred for the acquisition of any public utility under the provisions of this charter which, together with the existing bonded indebtedness of the city, shall exceed at any one time seven per centum of the assessed value of all real and personal property in the city, but in estimating such bonded indebtedness, all bonds given for the acquisi-

tion or construction of public properties and utilities, the interest on which bonds is paid out of the earnings of said public utilities or properties, shall be excluded * * *." (Sec. 160 and sec. 10-105 of comp. 1942).

In 1921 the Legislative Assembly passed a "Local Budget Law" applicable to all municipal corporations throughout the state, providing that it shall be unlawful to levy in any year any tax unless an estimate shall have been made "of the total amount of money proposed to be expended by the municipal corporation for all purposes during the fiscal year next ensuing." (Or. Code 1930, sec. 69-1103). The next section requires that such estimates "shall be fully itemized and shall be so prepared and arranged as to show in plain and succinct language each particular item of proposed expenditure * * *."

At the same session of the legislative assembly a commission known as the "Tax Supervising and Conservation Commission" was created in each county having a population of 100,000 or more inhabitants (and this embraces Portland which is in Multnomah County). This act requires the annual budget of each municipal corporation in such county to be submitted to this commission, before which the levying board had a right of hearing on all proposed levies to be made, and this *Commission had authority to "direct the several levying boards in the county to levy a tax in accordance with the findings and conclusions of said Commission* (Oregon Laws 1921, ch. 208; Oregon Code

1930, secs. 69-1206 and 69-1207). The act imposed severe penalties in addition to invalidity of a tax levy not made in accordance with the statute.

THE CONTRACT

THIS AGREEMENT, made and entered into the 28th day of October, 1931, by and between PUBLIC MARKET COMPANY OF PORTLAND, a corporation organized and existing under the laws of the State of Oregon (hereinafter sometimes referred to as the "Company"), and THE CITY OF PORTLAND, a municipal corporation of Multnomah County, State of Oregon, by its Mayor and Auditor (hereinafter sometimes referred to as the "City").

WITNESSETH

1. The Company agrees that within fifteen (15) days after the City shall have procured the approving opinion of legal counsel of the authority of the City to issue and sell the public market utility certificates authorized by Ordinance No. 61192, it will resume active construction of a public market building upon the real property in the City of Portland hereinafter more particularly described, according to plans and specifications hereto attached, marked Exhibit "A" and hereby made a part of this agreement, and that it will complete the construction of such building

according to said plans and specifications on or before July 15, 1932. The Company agrees that in the performance of the work the City, through its Building Inspector and/or City Engineer, shall have the right to inspect progress construction of the building from time to time for the purpose of ascertaining and reporting to the City whether or not said building is being constructed in accordance with the plans and specifications herein referred to. If at any time in the opinion of the said city officials the building is not being so constructed, it is agreed that they shall report such fact to the Company and to the City, and thereupon it shall be the duty of the Company to comply with the plans and specifications in the particulars designated by the said city officials. A failure upon the part of the Company to resume or complete said building within the times specified herein shall nullify this agreement, unless it develops that for reasons beyond the control of the Company, or by acts of God, or delays caused by litigation it cannot or should not be required to so resume or complete the building within said time, than and in that event and upon application therefor, the City shall give the Company such extension of time as the Council of the City may deem reasonable, under the circumstances and facts, in which to complete said building.

2. The Company agrees that it will acquire and install in said public market building within ten (10) days after

said building is completed, the equipment, materials and supplies more particularly described in Exhibit "B", which is hereto attached and hereby made a part of this agreement. In addition to the principal sum to be paid the Company, as hereinafter fixed, the City shall pay the Company the actual cost price of said equipment, materials and supplies estimated at this time to be approximately $46,418.00, plus ten per cent of the actual cost price to cover the services of the Company in making said purchases. Such purchases of materials, equipment and supplies shall be subject to the approval of the Council in all respects, including the prices therefor.

3. The Company agrees that upon the completion of said public market building and the purchase and installation therein of the equipment, materials and supplies described in said Exhibit "B", and as first approved by the Council, it will convey to the City, by warranty deed (and by bill of sale with relation to movable fixtures and personal property) good and marketable title to the following described property, to wit:

> The vacated portion of Yamhill Street, in the City of Portland, County of Multnomah, State of Oregon, which is particularly described as follows:
>
> All that portion of Yamhill Street which lies between a line commencing at a point on the south line of said Yamhill Street 40 feet easterly from the northwest corner of Block 75, in said City of Portland, run-

ning thence northerly and parallel with the easterly line of Front Street, in said City, to a point in the north line of said Yamhill Street, which point is 40 feet easterly from the southwesterly corner of Block 76 of said city and a line commencing at a point in the south line of said Yamhill Street which is 25 feet westerly from the present westerly harbor line of the Willamette River, running thence northerly parallel with and 25 feet distant from said harbor line to a point in the north line of said Yamhill Street which is distant 25 feet westerly from said harbor line;

and the vacated portion of Taylor Street, in the City of Portland, County of Multnomah and State of Oregon, which is particularly described as follows:

All that portion of Taylor Street which lies between a line commencing at a point on the south line of said Taylor Street 40 feet easterly from the northwest corner of Block 74, in said City of Portland, running thence northerly and parallel with the east line of Front Street in said City, to a point in the north line of said Taylor Street, which point is 40 feet easterly from the southwesterly corner of Block 75 of said City of Portland, and in a line commencing at a point in the south line of said Taylor Street which is 25 feet westerly from the present westerly harbor line of the Willamette River, running thence northerly, parallel with and 25 feet distant from said harbor line, to a point in the north line of said Taylor Street which is 25 feet distant from said harbor line.

Also all of Block 74, all of Block 75 and Lots 3 and 4 in Block 76, in the City of Portland, County of Multnomah, State of Oregon, except the southerly 4 feet of said Block 74 extending from a line beginning

> at a point 40 feet east of the easterly line of Front Street and extending parallel with the north line of Salmon Street to a point 25 feet easterly from the harbor line, and excepting also the easterly 40 feet of said Block 74 and said Block 75 and said Lots 3 and 4 of Block 76, and subject also to an easement vested in the City for the use of a strip of land 25 feet in width along the easterly side of said blocks and lots parallel with the harbor line of the Willamette River,

together with the building and improvements thereon and all equipment, materials and supplies therein, and furnish an abstract of title to said property. In lieu of an abstract of title the City reserves the right to require, at its expense, title insurance, and the Company agrees that upon demand it will deliver to the City, at the City's expense, but not exceeding the actual cost therefor, a title insurance policy covering said land and building to be issued by a company to be approved by the City, but said title to said property shall be subject to the unmatured Intercepting Sewer and Drainage System assessments, which the City assumes and agrees to pay out of the revenues from said public market utility, and to that certain party wall agreement between J. T. Hunsaker and Samuel Brown, dated November 3, 1873, recorded December 20, 1873, in Miscellaneous Book 2, Page 575, as modified by party wall agreement between Ann L. Lee and Joshua Roberts Mead, Stella B. Mead and William W. Mead, trustees of the estate of Stephen Mead, deceased, and W. P. Fuller Company, dated March 6, 1928,

and recorded March 23, 1928, in Book of Deeds 1142, at Page 4. It shall also be permissible for said title to be subject to taxes and assessments due and payable after November 5, 1931. The Company agrees that it will pay all legal taxes, assessments and interest which become due and are payable after November 5, 1931, up to the time that it delivers title to the City, and the City agrees that it will reimburse said Company from funds derived from the sale of Public Market Utility Certificates for all sums which said Company shall pay for such taxes, assessments and interest, with interest at six per cent from the date of said payment or payments. It shall also be permissible for said title, with respect to the vacated portions of Taylor and Yamhill Streets, to be subject to the right reserved to the City by the ordinance vacating said portions of said streets to repeal said vacations.

4. The ordinance by which the above described vacated portions of Taylor and Yamhill Streets were vacated specifically reserves to the City the right to repeal said vacation ordinance in the event the petitioner for said vacations, its successors or assigns, should fail to commence the construction of a market building upon the property vacated and adjoining property within three months from the effective date of said ordinance and complete the building within a reasonable time thereafter, and the City hereby agrees that said construction was duly and properly commenced

within the time limits specified in said ordinance and that since said date no unreasonable delay has occurred in connection with the completion of said market building, and hereby expressly waives and relinquishes the right to repeal the vacation of said portions of said streets, and the Council of the City agrees not to exercise or attempt to exercise such right of repeal.

5. The Company shall pave and gravel the driveways on the east and north sides of the said building, in accordance with the plans and specifications of the City Engineer, heretofore prepared.

6. Upon the completion by the Company of its obligations under this agreement, and at the time of the tender by the Company to the City of proper conveyances of said property and assignments of its leases, contracts and insurance policies affecting said premises, the City shall accept said conveyances and said assignments and shall pay to the Company the sum of $1,244,790.66; and as of the date of said conveyances and assignments and of the making of said payment by the City to the Company, there shall be an accounting between the City and the Company, and the Company shall pay to the City all prepayments of rent and pro rata shares of premiums and deposits based upon the unexpired portion of existing leases and all prepayments of other moneys under existing contracts which shall represent unearned income of the Company, and the City shall

pay to the Company all prepaid expenses which the Company has at that time advanced under the terms of its existing contracts. In addition to the principal sum of $1,244,790.66 hereinabove mentioned, and at the time provided for the payment of said sum, the City shall also reimburse the Company in the full amount of the cash advanced and/or liability incurred by the Company in the purchase of the equipment, materials and supplies described in Exhibit "B", and shall pay to the Company, in addition thereto, ten per cent (10%) of the purchase price of said equipment, materials and supplies to cover the services of the Company in making said purchases. Such purchases of materials, equipment and supplies shall be subject to the approval of the Council in all respects, including the price paid therefor. All payments due from the City to the Company hereunder, if unpaid to the Company when due, shall thereafter bear interest at the rate of six per cent (6%) per annum, payable quarter-annually.

7. The City shall have the right during the life of this contract, and at any time prior to the conveyance to the City by the Company of the property herein described, to require any alterations, additions or changes to be made in the plans and/or specifications of the market building and in the equipment, materials and supplies to be furnished, but such right shall be exercised only by instructions, in writing delivered by the City to the Company, and at the time of

the conveyances herein provided to be made by the Company to the City of the property herein described, the City shall pay to the Company, or the Company shall pay to the City, the cost plus fifteen per cent (15%) of all such alterations, additions or changes.

8. From the date of the execution and delivery of this agreement until completion of its other obligations herein set forth, the Company agrees that it will perform leasing service for the procuring of tenants for said public market building, the identity of such tenants and the terms and conditions of their tenancy to be subject to the approval of the City, through its Council, and agrees that before the City acquires said public market building it shall be so occupied as to be a going public market utility. At the time of the transfer of the property hereinbefore described, the City shall pay to the Company for said leasing service, in addition to the other payments provided for in this contract, ten per cent (10%) of the gross revenue derived from rental, plus bonuses and premiums, if any, figured on an annual basis, regardless of whether or not the same be reserved on an annual basis, which are reserved to the City under the leases and/or rental arrangements so procured by the Company, if any. Such percentage shall not be applicable, however, to space, if any, reserved by the City for municipal operation of any concession or privilege, and with respect to revenues thus derived the City shall pay

to the Company at the end of thirty (30) days after completion of this contract, the City's first month's revenue derived thereunder. Neither shall said percentage be applicable to farmers' space, but with respect to revenues derived from farmers' space the City shall pay to the Company five per cent of the estimated first year's revenues, such estimate to be based on the revenues during the first month after the completion of the market.

IN WITNESS WHEREOF, said PUBLIC MARKET COMPANY OF PORTLAND has caused these presents to be executed in its corporate name by its President or Vice-President, and Secretary or Assistant-Secretary, thereunto duly authorized, and its corporate seal to be hereunto affixed, and the said CITY OF PORTLAND has caused these presents to be executed by its Mayor, attested by its Auditor, pursuant to authority duly given under the terms of Ordinance No. 61566 of the City of Portland, enacted on the 10th day of October, 1931, and effective on the 10th day of October, 1931, and Resolution No. 20291, adopted October 28, 1931.